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No. 96-795

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN S. IRVING
Counsel of Record
CHRISTOPHER LANDAU
JEFFREY BOSSERT CLARK
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae

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37pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATION:

MISCELLANEOUS:

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty States, the Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and in every region of the country. The Chamber thus serves as the principal voice of the American business community.

One of the Chamber's principal functions is to represent the interests of its members in important matters before the courts of the United States, and especially this Court. The Chamber has sought to fulfill that function by filing briefs

amicus curiae in cases of importance to the business community, including cases (like this one) involving labor relations.[1]

This case presents an issue of particular legal and practical importance: when may an employer lawfully conduct a poll of its employees to ascertain whether an incumbent union continues to enjoy majority support? The National Labor Relations Board has announced and applied a standard whereby an employer cannot conduct such a poll unless it first knows the result. That standard essentially bans employer-sponsored polls and makes it practically impossible for an employer to challenge an incumbent union's presumption of majority support. The Chamber's members have a vital interest in defending their right to rebut this presumption and in clarifying this now-confused area of the law.

This brief is filed with the consent of both parties, and letters reflecting such consent have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

Petitioner Allentown Mack Sales and Service, Inc., is a company established in December 1990 by three former managers of the Mack Truck dealership in Allentown, Pennsylvania. *See* Pet. App. at 2a. The new company hired 32 of its predecessor's 45 employees. *See id.* All of these employees had previously been represented by a union, Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL-CIO. *See id.* at 2a, 40a.

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[1] *See, e.g., Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

During the period immediately before and after the sale, seven of petitioner's employees indicated to management that they no longer supported the union. One of these employees stated that the "entire night shift" (consisting of five or six employees) did not want the union. *See id.* at 14a, 51a. Another employee (a union shop steward) stated that the employees did not need a union. *See id.* at 14a. Yet another employee, who was a member of the union bargaining committee and the shop steward for the 23-member service department, stated that "'with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union.'" *Id.*

Based on these statements, petitioner postponed recognition of the union "until further investigation." *Id.* at 30a. It then polled its employees to determine whether a majority supported the union. *See id.* at 44a, 58a. The poll was supervised by a Roman Catholic priest, and complied fully with the procedural safeguards established by the National Labor Relations Board. *See id.* at 2a, 58a-60a.

The employees rejected the union by a 19-to-13 margin. *See id.* at 2a, 14a, 44a. Accordingly, petitioner withdrew recognition from the union. *See id.* at 2a. The union responded by filing unfair labor practices charges with the Board. *See id.*

The Board held that the poll violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). *See id.* at 26a n.9. The Board did not contest the poll's fairness or accuracy, *see id.* at 25a-26a, 58a-60a, but held instead that it violated the Act because petitioner did not have sufficient evidence of loss of union support to justify a poll in the first place, *see id.* at 25a-26a. The Board based this conclusion on its precedents holding that the same standard governs an employer's ability to poll its employees as to withdraw recognition from an incumbent union. To satisfy that standard in either context, according to the Board, an employer must have a good-faith doubt regarding the union's majority status.

See id. at 25a-26a & n.9 (citing *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1058-63 (1989)). Because a majority of petitioner's employees had not specifically informed management that they opposed the union, the Board held that petitioner lacked such doubt. *See* Pet. App. at 21a-26a. The Board further asserted that "because the poll itself was an unfair labor practice, [the employer] could not lawfully rely on the results of the poll in declining to recognize the [u]nion." *Id.* at 27a. Accordingly, the Board held that petitioner's withdrawal of recognition was also unlawful and ordered the company to bargain with the very union rejected by a majority of its employees. *See id.* at 27a, 62a-63a.

A divided panel of the U.S. Court of Appeals for the D.C. Circuit enforced the Board's order. *See id.* at 1a-18a. The panel majority expressly rejected the decisions of three other Courts of Appeals, all of which had refused to enforce the Board's polling standard. *See id.* at 3a-8a. The dissenting judge noted that the Board's standard led to the "bizarre result" that "an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless." *Id.* at 15a.

SUMMARY OF ARGUMENT

This case highlights an inherent conflict among several strands of federal labor law developed by the National Labor Relations Board. *First*, the Board has long acknowledged an employer's right to poll its employees in a non-coercive manner to determine their level of union support. *Second*, for more than half a century, the Board has recognized an employer's right to withdraw recognition from an incumbent union on the basis of a "good-faith doubt" regarding the union's majority status. But *third*, and at issue here, the Board in recent years has held that an employer cannot lawfully conduct a poll unless a majority of its employees have first expressed a specific desire to repudiate an incumbent union. An employer, in other words, is free to poll its employees, but

only when it already knows the results of that poll. As the dissenting judge noted below, that result gives new meaning to Dickens' phrase "the law is a ass." The Board's contradictory matrix of rules governing workplace polling is arbitrary and capricious, and hence invalid under basic principles of administrative law.

Even if the Board's polling standard could survive routine "arbitrary and capricious" review, moreover, the Board lacks the statutory authority to restrict non-coercive polling. The Board in this case invoked its power under § 8(a)(1) of the National Labor Relations Act, which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their statutory right to self-organization. 29 U.S.C. § 158(a)(1). But a poll (like the one involved here) that is concededly non-coercive under the Board's own rigorous standards cannot be proscribed as an unfair labor practice for the simple reason that it does not "interfere with, restrain, or coerce" the exercise of any employee rights. Indeed, any construction of the Act that would restrict employers from polling their employees in a non-coercive manner would, at the very least, raise First Amendment problems of the first order.

ARGUMENT

I. THE BOARD'S POLLING STANDARD IS ARBITRARY AND CAPRICIOUS.

The Board order under review in this case must be set aside, first and foremost, because it violates the bedrock administrative-law proscription against "arbitrary and capricious" agency action. *See* 5 U.S.C. § 706(2)(A). To be sure, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But a reviewing court need not, and must not, rubber-stamp agency

action. *See id.* That is especially true where, as here, Congress has required the courts to ascertain that challenged agency action is "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e), (f). The order in this case must be set aside because the Board's confusing and contradictory matrix of rules governing workplace polling simply defies reasoned analysis. *See, e.g., State Farm*, 463 U.S. at 42-44.

A. The Board's Standard Renders Polling Useless, and Thereby Makes It Effectively Impossible for an Employer to Establish "Good-Faith Doubt" Regarding Employee Union Sympathies.

The Board's order concluding that petitioner committed an unfair labor practice by polling its employees is fundamentally inconsistent with longstanding precedent holding that an employer enjoys the right (1) to poll its employees in a non-coercive manner to determine their level of union support, and (2) to withdraw recognition from an incumbent union on the basis of a "good-faith doubt" regarding the union's majority status. To appreciate this inconsistency, it is necessary to understand the complicated matrix of legal rules governing this area.

For one year after certification or voluntary recognition and up to three years after entering into a collective bargaining agreement, a union typically enjoys an irrebuttable presumption of majority support. *See, e.g., Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1758 (1996); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-78 (1990). After that point, the presumption is subject to rebuttal; an employer can overcome it by proving that either "(1) the union did not *in fact* enjoy majority support, or (2) the employer had a *'good-faith' doubt*, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778 (emphasis added). *See also Stormor, Inc.*, 268 N.L.R.B. 860, 866-67 (1984). The employer's good-faith doubt, in other

words, has long been recognized as a complete defense to an unfair labor practice charge. *See, e.g., Windham Community Mem'l Hosp.*, 230 N.L.R.B. 1070, 1073 (1977), *enf'd*, 577 F.2d 805 (2d Cir. 1978); *Celanese Corp.*, 95 N.L.R.B. 664, 675 (1951); *E.A. Labs., Inc.*, 80 N.L.R.B. 625, 683 (1948), *enf'd as modified*, 188 F.2d 885 (2d Cir.), *cert. denied*, 342 U.S. 871 (1951). "The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, *even if in fact the Union did represent a majority*, was recognized early in the administration of the Act." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597 n.11 (1969) (emphasis added) (citing *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 868 (2d Cir.) (L. Hand, J.), *cert. denied*, 304 U.S. 576 (1938)). *See also Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), *enf'd as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Robeson Cutlery Co.*, 67 N.L.R.B. 481, 481, 499-500 (1946); *Sanco Piece Dye Works, Inc.*, 38 N.L.R.B. 690, 710-11 (1942).

Indeed, it is an unfair labor practice for an employer to confer exclusive representation status upon a union that enjoys only minority employee support. *See, e.g., Garment Workers v. NLRB*, 366 U.S. 731, 736 (1961). A good-faith belief in a union's majority status is no defense. *See id.* Thus, an employer should withdraw recognition from an incumbent union without delay as soon as it has a good-faith doubt regarding majority status. *See, e.g., Auciello*, 116 S. Ct. at 1760-61.

It is far from easy for an employer to rebut the presumption of continued union support. Under established Board precedent, one way is for the employer to prove that a majority of its employees of their own accord had approached the employer and expressed a specific and unequivocal desire to repudiate the union. *See, e.g., Phoenix Pipe & Tube, L.P.*, 302 N.L.R.B. 122, 122, *enf'd*, 955 F.2d 852 (3d Cir. 1991); *Destileria Serralles, Inc.*, 289 N.L.R.B. 51, 51-52 (1988),

enf'd, 882 F.2d 19 (1st Cir. 1989); *Bryan Mem'l Hosp.*, 279 N.L.R.B. 222, 225 (1986), *enf'd*, 814 F.2d 1259 (8th Cir.), *cert. denied*, 484 U.S. 849 (1987). The test is exceedingly demanding: indeed, the Board has held that the fact that a majority of employees responded negatively to the question of whether they "wish[ed] to remain in the Union" did not "express the unequivocal repudiation of a union which the Board requires to serve as the basis for a good-faith doubt of majority status." *Vic Koenig Chevrolet, Inc.*, 321 N.L.R.B. No. 168, at 6 (Aug. 27, 1996). Anti-union sentiments expressed during a job interview, general employee statements of dissatisfaction with the quality of union representation, or one employee's report of other employees' antipathy toward a union typically are insufficient. *See, e.g., Apparatus Serv., Inc.*, 296 N.L.R.B. 581, 583 (1989) (job interview); *Upper Miss. Towing Corp.*, 246 N.L.R.B. 262, 273-74 (1979) (general expressions); *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 n.11 (1989) (employees speaking for other employees). *See also New Associates*, 307 N.L.R.B. 1131, 1136 (1992) (employee-initiated decertification petition not sufficient to raise good-faith doubt regarding union's majority status), *enf. denied*, 35 F.3d 828 (3d Cir. 1994).

Because it is all but impossible as a practical matter (especially in large bargaining units) for a majority of employees to approach an employer to express a "specific desire" to repudiate an incumbent union, the Board has long recognized the validity of polling as an alternate means for an employer to ascertain the level of union support among its employees. *See, e.g., Taft Broadcasting*, 201 N.L.R.B. 801, 803 (1973); *A.L. Gilbert Co.*, 110 N.L.R.B. 2067, 2072 (1954). Over time, the Board has developed an array of procedural safeguards designed to ensure that any such poll is conducted in a fair and non-coercive manner. *See Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967). A poll is lawful, the Board has held, if (1) its purpose is to determine the validity of a union's claim of majority status, (2) that purpose is communicated to

the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *See id.* at 1063. Although *Struksnes* involved a pre-certification poll, the Board has applied its procedural safeguards to post-certification polls as well. *See, e.g., Lou's Produce, Inc.*, 308 N.L.R.B. 1194, 1204 (1992), *enf'd*, 21 F.2d 1114 (9th Cir. 1994); *Hajoca Corp.*, 291 N.L.R.B. 104, 1121-3 (1988), *enf'd*, 872 F.2d 1169 (3d Cir. 1989); *Hohn Indus.*, 283 N.L.R.B. 71, 71 n.2 (1987).

The dispute in this case arises from the Board's further holding that an employer seeking to poll its employees after certification without committing an unfair labor practice must not only comply with the *Struksnes* safeguards but *also* must show "a reasonable basis for believing that the union has lost its majority [status] since its certification." *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 717 (1974). Because that standard is, by the Board's admission, *precisely the same standard that governs an employer's ability to withdraw recognition from an incumbent union*, the *Montgomery Ward* polling standard created the anomaly at issue here: an employer cannot poll its employees unless it already knows the results of that poll.

Over the years following *Montgomery Ward*, three federal courts of appeals refused to enforce orders applying the Board's stringent polling standard. *See, e.g., Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981). In light of these judicial rebukes, the Board in 1989 reconsidered *Montgomery Ward*. *See Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enf'd in part on other grounds*, 923 F.2d 398 (5th Cir. 1991). By a divided vote, however, the Board decided to reaffirm *Montgomery Ward*, *see* 296 N.L.R.B. at 1059-63; *id.* at 1065-66 (Chairman Stephens, concurring), while at the same time reaffirming an

employer's "right" to poll its employees and disclaiming any desire to "do away with such polls," *id.* at 1061. The Board proceeded to apply the *Montgomery Ward/Texas Petrochemicals* standard in this case to hold petitioner guilty of an unfair labor practice, *see* Pet. App. at 20a-27a, 42a-60a, and a divided panel of the D.C. Circuit enforced that order, *see id.* at 3a-12a, 13a-18a (Sentelle, J., dissenting).

As the Fifth, Sixth, and Ninth Circuits have recognized, the Board's polling standard gives rise to two basic anomalies. *First,* the standard effectively outlaws polling *sub silentio* by allowing an employer to conduct a poll only when it already has enough information to render any such poll superfluous. *See, e.g., Mingtree Restaurant,* 736 F.2d at 1297 ("[T]he *Montgomery Ward* rule is tantamount to an outright prohibition of employer-sponsored polls."). The point of a poll, after all, is to allow an employer to ascertain whether it might be necessary or appropriate to withdraw recognition from an incumbent union. It makes no sense, thus, to allow polling in circumstances where an employer would already be justified in withdrawing recognition. "[T]he Board's position [is] untenable [because] an employer would only be allowed to take a poll under circumstances where no poll was necessary." *Thomas Indus.,* 687 F.2d at 867. *See also Mingtree Restaurant,* 736 F.2d at 1297; *A.W. Thompson,* 651 F.2d at 1144.

Even assuming that the Board had the statutory and constitutional authority to prevent an employer from conducting a non-coercive poll of its employees—an assumption that *amicus* challenges in Part II, *infra*—the Board may not do so by subterfuge. An administrative agency cannot, by semantic sleight-of-hand, outlaw a practice that it purports to permit. If the Board wishes to change course, it must at the very least do so forthrightly—and thus acknowledge and accept the legal and political consequences of its actions. *See, e.g., State Farm,* 463 U.S. at 41-42; *cf.* Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB*

Policymaking and the Failure of Judicial Review, 75 B.U. L. Rev. 387, 393-404 (1995).

Second, the Board's polling standard effectively abolishes the venerable "good-faith doubt" standard *sub silentio* by making it all but impossible for an employer to satisfy that standard. If an employer cannot poll its employees, the only way it can lawfully ascertain the level of union support is to wait for a majority of the employees to express a specific and unequivocal desire to repudiate an incumbent union. But that requires the employer to wait until it knows that a union does not *in fact* command majority support; it leaves no room whatsoever for a "good-faith doubt."

This anomaly did not escape notice during this Court's most recent foray into this area in *Curtin Matheson.* The Chief Justice highlighted the inherent tension between Board decisions "requir[ing] an employer to show that individual employees have 'expressed desires' to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status," and the Board's *Texas Petrochemicals* rule "prevent[ing] the employer from polling its employees unless it first establishes a good-faith doubt of majority status." 494 U.S. at 797 (concurring opinion). "I have considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments." *Id.* Justice Blackmun emphasized the same anomaly, observing that it places an employer in "a difficult bind." *Id.* at 799 & n.3 (dissenting opinion). That is something of an understatement: in fact, the Board's polling standard effectively destroys an employer's right to withdraw recognition from a minority union. Indeed, the standard places employers squarely in a "Catch-22": they are guilty of an unfair labor practice if they bargain with a minority union, *see, e.g., Garment Workers,* 366 U.S. at 736, but they also are

guilty of an unfair labor practice if they attempt to ascertain whether an incumbent union has lost majority support.[2] Whatever the Board's power to eliminate its longstanding "good-faith doubt" rule (a question that remains open, *see Curtin Matheson*, 494 U.S. at 788 n.8; *id.* at 800-01 (Blackmun, J., dissenting)), it plainly cannot do so by stealth.[3]

The upshot of these anomalies, of course, is not that the Board must allow unrestricted polling to rebut the presumption of majority support. Rather, the point is only that the Board

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[2] Although the Board and the court below attempted to deny this contradiction by asserting that an employer may safely rely on the presumption of continued majority support, *see Texas Petrochemicals*, 296 N.L.R.B. at 1062; Pet. App. at 7a, their assertion is hollow. An employer is statutorily forbidden from recognizing a minority union *regardless* of a good-faith basis for doing so. *See Garment Workers*, 366 U.S. at 736. The Board's assertion, moreover, ignores the destruction of the employer's statutory *right* (the corollary of its statutory *duty*) to withdraw recognition from a minority union.

For the same reasons, the Board cannot defend its polling standard on the ground that employees themselves have the right to petition for a Board-conducted election. *See Texas Petrochemicals*, 296 N.L.R.B. at 1062. Such petitions are not only cumbersome in practice—they must be signed by at least 30% of the employees, *see* 29 C.F.R. § 101.18(a)-(b)—but also have nothing to do with an employer's *right* and *duty* to withdraw recognition from a minority union. *See gener[illegible]ly* Note, *Employer Postcertification Polls to Determine Union Support*, 84 Mich. L. Rev. 1770, 1781-82 (1986).

[3] The AFL-CIO has previously urged this Court to reject the "good-faith doubt" standard altogether and to hold that an employer can withdraw recognition from an incumbent union *only* by showing an actual loss of majority status following a Board-conducted election. *See Curtin Matheson*, 494 U.S. at 788 n.8. That aggressive argument is not only misguided on the merits, but—most pertinent here—misdirected to this Court. The Board *has not remotely purported* to abolish the longstanding "good-faith doubt" rule. *See id.* (citing *Stormor, Inc.*, 268 N.L.R.B. 860, 866-67 (1984)). The validity of that rule is not before the Court in this case. Under fundamental principles of administrative law, agency action may be upheld only on the basis relied upon by the agency. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

cannot—without even purporting to ban polling or eliminate the good-faith doubt rule—set the *same* standard for polling as for withdrawing recognition from an incumbent union. As the Fifth, Sixth, and Ninth Circuits have sensibly recognized, the most stringent feasible polling standard is one that allows an employer to conduct a poll on the basis of "substantial, objective evidence [that] the union has lost support," even if such evidence would be insufficient by itself to justify withdrawal of recognition. *A.W. Thompson*, 651 F.2d at 1145. *See also Mingtree Restaurant*, 736 F.2d at 1299; *Thomas Indus.*, 687 F.2d at 867. The Board's current polling standard cannot survive even deferential "arbitrary and capricious" review.

B. The Board's Polling Standard Makes it Harder for an Employer Lawfully to Conduct a Poll than to Question Individual Employees.

In addition to the anomalies noted above, the Board's polling standard also leads to the curious result that it is harder for an employer lawfully to conduct a non-coercive poll of *all* employees than to question *individual* employees about their union sympathies. Under longstanding Board precedent, an employer has the right to "interrogate" individual employees as long as the questioning is not coercive. *See, e.g., Blue Flash Express, Inc.*, 109 N.L.R.B. 591 (1954). The coercion inquiry is governed by a multi-factor totality-of-the circumstances analysis. *See id.* at 594 (relevant factors include "[t]he time, the place, the personnel involved, the information sought and the employer's conceded preference"). Under that standard (or analogous standards applied by the courts of appeals), the questioning of individual employees "is not held to be an unfair labor practice unless it meets certain fairly severe" requirements. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) *(per curiam)*. *See also Architectural Glass & Metal Co., Inc.*, 107 F.3d 426, 434 (6th Cir. 1997); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 366-68 (5th Cir. 1990); *NLRB v.*

Intertherm, Inc., 596 F.2d 267, 277-78 (8th Cir. 1979); *Teamsters Local 633 v. NLRB*, 509 F.2d 490, 493-95 (D.C. Cir. 1974); *cf. Rossmore House*, 269 N.L.R.B. 1176, 1178 n.20 (1984) (applying *Bourne* coercion standard), *enf'd*, 760 F.2d 1006 (9th Cir.1985).

Needless to say, it makes no sense for the Board to limit an employer's right to poll *all* employees more stringently than its right to question *individual* employees. If anything, employees need *more* protection when they are questioned one-on-one than when they vote *en masse* in a non-coercive poll. As noted above, *see supra* at 8-9, employer-sponsored polls are subject to a host of procedural protections, including secret balloting. No such categorical protections apply to individual questioning; there are—as yet—no *Miranda* warnings in this context. Indeed, the juxtaposition of the Board's *de facto* ban on polling with its flexible treatment of individualized interrogation is all the more startling "because the Board itself has recognized that a properly conducted secret ballot poll of an entire bargaining unit is inherently less coercive than the direct questioning of an individual employee." Note, *Employer Postcertification Polls to Determine Union Support*, 84 Mich. L. Rev. 1770, 1776 (1986) (citing *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1063 (1967), and *Rossmore House*, 269 N.L.R.B. 1176 (1984)).

This confusion is exacerbated by the Board's failure to explain "where or why [it] draws the line between 'polling' and other types of 'interrogation' in individual fact scenarios." *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997). An employer cannot conduct a *de facto* poll by simply questioning employees individually—at some (undefined) point, individualized questioning is deemed to become a poll. "[T]he Board has rarely articulated its rationale for choosing 'polling' analysis over 'interrogation' analysis in particular decisions, and some of its choices between the two defy classification." *Id.* at 1360. Accordingly, it is virtually

impossible for an employer lawfully to ascertain whether a majority of its employees continue to support an incumbent union. The Board's conflicting decisions in this area leave employers mired in a "Serbonian bog." *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381, 388 (5th Cir. 1960).

C. The Board's Justifications for its Polling Standard Are Unpersuasive.

The Board has attempted to justify its stringent polling standard by asserting that the standard (1) does not render polling useless, *see Texas Petrochemicals*, 296 N.L.R.B. at 1063, (2) prevents the anomaly of having a lower standard for polling than for Board-conducted elections, *see id.* at 1060-61, and (3) "promote[s] industrial and workplace stability" by protecting incumbent unions, *id.* at 1061. None of these asserted justifications, however, can save the standard.

1. The Board's Polling Standard Does Not Establish a "Safe Harbor" for Employers.

As an initial matter, the Board rejects the criticism that its polling standard effectively bans employer-sponsored polls by rendering them useless. *See id.* at 1063 (challenging reasoning in *Mingtree Restaurant*, 736 F.2d at 1297-98, *Thomas Indus.*, 687 F.2d at 867, and *A.W. Thompson*, 651 F.2d at 1144). Importing the stringent standard for withdrawal of recognition into the polling context, the Board declares, "provides an employer with a clear choice": it may either (1) withdraw recognition or (2) conduct a poll. *Texas Petrochemicals*, 296 N.L.R.B. at 1063. A poll remains a viable option, according to the Board, because it provides an employer with greater certainty regarding the level of union support among employees. "Rather than simply withdraw recognition from a union that might still in fact have majority support, an employer may wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt. The employer can then

act with confidence and certainty in light of the results of the poll." *Id.* The Board thus suggests that, even under its stringent standard, a poll operates as a sort of "safe harbor" for an employer uncertain about the propriety of withdrawing recognition from an incumbent union.

Any such "safe harbor," however, is wholly illusory. A poll is useful only as a means for an employer to determine whether to withdraw recognition. As long as the standard for polling and withdrawal of recognition is the same, a poll is meaningless: if the employer would not have been justified in withdrawing recognition, it would not have been justified in taking the poll. The certainty added by the poll, in other words, has no legal or practical effect. If an employer does not know whether a union has lost majority support, it commits an unfair labor practice either by conducting a poll or by withdrawing recognition. Indeed, in this case petitioner was charged with unfair labor practices on *both* grounds.[4]

2. The Board's Polling Standard Is Not Necessary to Protect the Utility of the Formal Election Mechanism.

The Board also asserts that its stringent polling standard—whatever anomalies it might create—is necessary to prevent the further "anomalous" situation that would allegedly arise if the standard for polling were lower than the standard

[4] The majority opinion below suggested that the Board could cure this fundamental anomaly "by raising [its] withdrawal-of-recognition standard." Pet. App. at 6a. That suggestion, however, provides no basis for upholding the challenged polling standard. As an initial matter, it is elementary that administrative action can be upheld only on the grounds provided by the agency. *See, e.g., Chenery*, 318 U.S. at 94-95. A court, in other words, cannot substitute its own justifications. *See id.* In any event, the possibility that the Board might at some future date resolve this anomaly cannot justify upholding the order issued against petitioner *in this case*, especially because it is probably impossible either in theory or in practice for the Board to raise any higher its standard for withdrawal of recognition.

for petitioning for a Board-conducted election. *See id.* at 1060. Unless the standard for polling is "at least as stringent as that for [Board-conducted] RM elections," the Board insists, an employer would have no incentive to petition for an election and the formal election mechanism would be undermined. *Id.*[5]

The most obvious answer to that argument is that the Board cannot justify one anomaly by conjuring up another. The various standards at issue here are not immutable truths of nature; they are simply a product of past Board decisions. An administrative agency, of course, cannot possibly prevail in a "battle of the anomalies" of its own creation. Indeed, the Board could readily cure the anomaly that results from applying the same standard to polling and withdrawal of recognition without in turn setting different standards for polling and RM elections: it could simply relax *both* the standards for polling and for elections. Perhaps there is a reason why the Board has refused to take that step, but, if so, that reason has never been articulated.

In any event, it is not true that it would be anomalous to set a lower standard for polling than for petitioning for an RM election. The legal consequences of polls and elections differ markedly. A poll is simply a mechanism for an employer to determine whether it is necessary and appropriate to withdraw recognition from an incumbent union. Following any such withdrawal, the union would remain free to challenge the poll and seek an election. An election, in contrast to a poll, is conclusive. It requires the Board's participation and carries not only the imprimatur of Board certification but also (if the union wins) a one-year irrebuttable presumption of majority status, or

[5] Employer-initiated elections are authorized by § 9(c)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 159(c)(1)(B), and are often called "RM elections" in light of the Board's internal classification system. *See, e.g.*, 1 P. Hardin, *The Developing Labor Law* 378, 383 (3d ed. 1992). They entail a host of procedural requirements. *See id.* at 414-47.

(if the union loses) a one-year statutory bar to another election. *See* 29 U.S.C. § 159(c)(3). It only stands to reason, thus, that a higher standard should apply to trigger an RM election than a poll.

Furthermore, even if the Board were correct that setting a lower standard for polls than for RM elections would create a disincentive for employers to petition for elections, that would in no way undermine the utility of the formal election mechanism. Unions and employees would always remain free to challenge polls by petitioning for an election. Employers themselves might prefer to request an RM election rather than face a challenge to a poll. Indeed, even the courts have long exercised authority to order elections to resolve disputes over withdrawals of recognition, some of them resulting from contested polls. *See, e.g., NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 568, 571-72 (2d Cir. 1994); *Texas Petrochemicals v. NLRB*, 923 F.2d 398, 405-06 (5th Cir. 1991); *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713, 723 (2d Cir. 1961); *NLRB v. National Licorice Co.*, 104 F.2d 655, 658 (2d Cir. 1939) (L. Hand, J.), *aff'd*, 309 U.S. 350 (1940). In the final analysis, there is nothing wrong with an employer taking "reasonable steps to verify union claims" of majority support in order to "obviate a Board election." *Garment Workers*, 366 U.S. at 739. Polling simply happens to be the most reliable and efficient of such "reasonable steps."

3. The Board's Polling Standard Does Not Promote "Workplace Stability" in a Permissible Manner.

Finally, and most generally, the Board asserts that its stringent polling standard is necessary "to promote industrial and workplace stability." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. "[P]olling employees about their continued support for an incumbent union is itself potentially, if not inherently, both disruptive of the collective-bargaining relationship

between an employer and a union and also unsettling to the employees involved." *Id.*

Those assertions cannot validate the Board's illogical standard. Although the Board surely enjoys a degree of discretion in evaluating "the complexities of industrial life," *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (internal quotation omitted), such discretion is by no means unbounded. Whatever the Board's policy preferences, it may not—under basic principles of administrative law—pursue them in a manner that is arbitrary or contrary to the governing statute. *See, e.g., State Farm*, 463 U.S. at 43-44.

Thus, even if the Board were correct that its polling standard is likely to "promote industrial and workplace stability" by making it difficult for an employer to challenge an incumbent union, that would not explain why that anomalous standard is preferable to an outright ban on polling. The issue in this case, after all, is not the validity of polling—a practice that the Board has not purported to outlaw—but rather the validity of the current regime whereby an employer is free to poll its employees, but only when it already knows the results of the poll. That regime makes no sense, and cannot be rationalized by platitudes about industrial peace.

The Board's "stability" justification also proves too much from a statutory point of view. *Any* rule that favors an incumbent union can be said to "promote industrial and workplace stability." Indeed, that goal would best be promoted by a rule imposing a perpetual irrebuttable presumption of majority support. But such a rule would undoubtedly be invalid in light of the emphasis on labor *democracy* in the National Labor Relations Act. Employees should not be forced to be represented by, and employers should not be forced to bargain with, a minority union. *See, e.g., Garment Workers*, 366 U.S. at 737-38. The Act is squarely premised on the principle of majority rule. *See, e.g., NLRB v. A.J. Tower Co.*,

329 U.S. 324, 331 (1946). A legitimate interest in "stability" is not a license to ignore democracy.

II. THE BOARD'S POLLING STANDARD LACKS ANY STATUTORY BASIS.

A. The Act Does Not Authorize the Board to Proscribe Non-Coercive Polling.

The Board order under review is not only arbitrary and capricious; it is also *ultra vires*. The Board expressly invoked its authority under § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), which prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees" in the exercise of their statutory right to self-organization. *See* Pet. App. at 26a n.9. The Board did not, however, conclude that the poll in this case involved any coercion or otherwise impinged upon the rights of petitioner's employees. Rather, the Board simply asserted that *any* poll conducted before an employer knows the outcome—regardless of how procedurally proper and non-coercive—*per se* amounted to an unfair labor practice proscribed by § 8(a)(1). *See* Pet. App. at 25a-27a; *Texas Petrochemicals*, 296 N.L.R.B. at 1057.

The Court of Appeals deferred to the Board's polling standard on the theory that "[n]othing in the National Labor Relations Act specifically governs this practice." Pet. App. at 7a. While acknowledging that the Board's standard "has its faults," *id.* at 8a, the panel majority declared that "[t]he Board, not the courts, has the primary responsibility for developing and applying national labor policy," *id.* (internal quotation omitted).

The Court of Appeals framed the issue precisely backwards. An agency does not enjoy unfettered authority absent any specific restriction in its governing statute; rather, an agency enjoys only such authority as that statute specifically confers. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Public*

Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). Thus, the Act's silence on the issue of polling does not authorize the Board to regulate the practice at will. The Board cannot deem a poll to be an unfair labor practice without first identifying a valid statutory source of authority. "[T]he statute must control the Board's decision, not the other way around." *NLRB v. Health Care & Retirement Corp.*, 114 S. Ct. 1778, 1784 (1994).

To be sure, the Board is entitled to judicial deference when interpreting ambiguous provisions of the Act. *See, e.g., Lechmere*, 502 U.S. at 536; *cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the familiar *Chevron* analysis, the threshold question is whether the statute addresses the particular interpretive question at hand. If so, "that is the end of the matter," because both agencies and courts must implement statutory commands. *Chevron*, 467 U.S. at 842. If the statute is ambiguous, however, a court must defer to a reasonable agency interpretation. *See id.* at 843-44.

The Board's reliance on § 8(a)(1) as the source of its authority to implement a blanket proscription on non-coercive polling is misplaced. That provision authorizes the Board to proscribe as "unfair labor practices" only those actions by an employer that "interfere with, restrain, or coerce" the self-organization rights of its employees. 29 U.S.C. § 158(a)(1). It necessarily follows that the Board cannot proscribe as an "unfair labor practice" any and all *other* actions by an employer. Employer actions (including polls) that do not "interfere with, restrain, or coerce" employees' self-organization rights simply do not fall within the scope of § 8(a)(1). "[M]ere polling as to union sentiment cannot abstractly be declared to constitute a violation of Sec. 8(a)(1)." *NLRB v. Protein Blenders, Inc.*, 215 F.2d 749, 750 (8th Cir. 1954). Before the Board can hold an employer guilty of an unfair labor practice for conducting a poll (or otherwise

questioning its employees about their union sympathies), in short, it must first establish that the employer's actions in some way infringed upon the employees' right of self-organization. *See, e.g., General Mercantile & Hardware Co. v. NLRB*, 461 F.2d 952, 954 (8th Cir. 1972); *NLRB v. Miami Coca-Cola Bottling Co.*, 382 F.2d 921, 924 (5th Cir. 1967); *NLRB v. Associated Dry Goods Corp.*, 209 F.2d 593, 595 (2d Cir. 1954); *Wayside Press v. NLRB*, 206 F.2d 862, 864 (9th Cir. 1953); *NLRB v. Tennessee Coach Co.*, 191 F.2d 546, 555 (6th Cir. 1951); *Sax v. NLRB*, 171 F.2d 769, 772-73 (7th Cir. 1948).

The Board in this case failed to establish anything of the kind. There is no question that petitioner's poll satisfied the Board's rigorous *Struksnes* standards for procedural fairness. It was conducted by none other than a *priest*. The Administrative Law Judge specifically found that "there is nothing in the evidence . . . to indicate that there was anything questionable or coercive about the poll." Pet. App. at 60a; *see also id.* at 58a-59a. The Board itself in no way purported to find that the poll "interfere[d] with, restrain[ed], or coerce[d]" petitioner's employees in exercising their right to self-organization. Accordingly, the Board had no power in this case to hold petitioner guilty of an unfair labor practice. "[T]he Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965). Because the Board overstepped its statutory bounds, the Court of Appeals erred by deferring to the Board's interpretation of the statute. "Deference to the Board cannot be allowed to slip into judicial inertia." *NLRB v. Financial Inst. Emp'ees*, 475 U.S. 192, 202 (1985) (internal quotation omitted).[6]

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[6] Even assuming, *arguendo*, that § 8(a)(1) could be read to authorize the Board to proscribe non-coercive polls, the Board's incoherent and (continued...)

B. Any Interpretation of the Act that Would Authorize the Board to Proscribe Non-Coercive Polling Would, at the Very Least, Raise Serious First Amendment Questions.

Indeed, any interpretation of the Act that would authorize the Board to proscribe non-coercive polling would, at the very least, raise serious First Amendment questions. Employers, no less than other citizens, enjoy the right to freedom of expression. *See, e.g., Gissel Packing*, 395 U.S. at 617; *Thomas v. Collins*, 323 U.S. 516, 532 (1945); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 478 (1941). That right is guaranteed not only by the First Amendment, but also by § 8(c) of the Act, 29 U.S.C. § 158(c), which "implements the First Amendment" by establishing "an employer's free speech right to communicate his views to his employees." *Gissel Packing*, 395 U.S. at 617.[7]

The Board, however, has long held that the protections of § 8(c)—and, by extension, the First Amendment—are not implicated when an employer seeks to poll or otherwise question its employees about their union sympathies. According to the Board, such employer activities are not expressive in nature. "[A]n employer, in questioning his employees as to their union sympathies, is not expressing

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[6] (...continued)
contradictory rules on polling do not reflect a reasonable interpretation of the statute for the reasons set forth in Part I, *supra*. *Cf. National Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726-27 (D.C. Cir. 1994) (Silberman, J.) (noting overlap between second step of *Chevron* inquiry and conventional "arbitrary and capricious" review).

[7] Section 8(c), which was added to the Act by the Taft-Hartley Amendments of 1947, provides in pertinent part as follows: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

views, argument, or opinion within the meaning of Section 8(c) of the Act, as the purpose of an inquiry is not to express views but to ascertain those of the person questioned." *Struksnes*, 165 N.L.R.B. at 1062 n.8. *See also Cannon Elec. Co.*, 151 N.L.R.B. 1465, 1469 (1965) ("Interrogation, particularly systematic polling of employees as to their union sympathies, is not an expression of 'views, argument, or opinion' within the meaning of Section 8(c). The purpose of interrogation is not to express views, but to ascertain those of the person interrogated."), *overruled on other grounds, Resistance Tech.*, 280 N.L.R.B. 1004 (1986); *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358, 1363 (1949) ("[W]e again reject the contention that interrogation is protected by Section 8(c) of the amended Act. . . . [T]he purpose of [§ 8(c)] is to permit an employer to express his views, not to license him to extract those of his employees.").

The Board has thereby evinced a seriously deficient understanding of the First Amendment. A question or solicitation, no less than a declarative statement, is a form of expression. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-32 (1980); *cf. United States v. Long*, 905 F.2d 1572, 1579-80 (D.C. Cir.) (Thomas, J.), *cert. denied*, 498 U.S. 948 (1990). Indeed, the Board's rationale for restricting employer polling and other forms of questioning—that such activities implicitly convey a message of anti-union animus—flatly contradicts the notion that such activities are non-expressive. *See Allegheny Ludlum*, 104 F.3d at 1363. A free and open interchange of ideas and information necessarily entails the ability to solicit the views of others. *Cf. International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 677-78 (1992); *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788-89 (1988). The Board cannot, by simply reciting the mantra "industrial and workplace stability," muzzle an employer's freedom to communicate with its employees, at least insofar as such communication is truthful

and non-coercive. *See, e.g., Thomas*, 323 U.S. at 532; *Virginia Elec. & Power Co.*, 314 U.S. at 478; *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 277-78 (8th Cir. 1979); *NLRB v. Golub Corp.*, 388 F.2d 921, 926-29 (2d Cir. 1967) (Friendly, J.); *cf. 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507-08 (1996).

Accordingly, the Board cannot, consistent with the First Amendment, prevent an employer from conducting a concededly non-coercive poll (like the one at issue here) to assess the level of union sympathy (or antipathy) among its employees. It necessarily follows that the Act must be construed in a manner that would avoid such an unconstitutional result. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575-78 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979). Indeed, this Court has repeatedly rejected the Board's efforts to characterize communicative activity protected by the First Amendment as an "unfair labor practice." *See, e.g., DeBartolo*, 485 U.S. at 577-78 (employee handbilling); *NLRB v. Drivers*, 362 U.S. 274, 284 (1960) (employee picketing).

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the District of Columbia should be reversed and enforcement of the Board's order should be denied.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street. N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN S. IRVING
Counsel of Record
CHRISTOPHER LANDAU
JEFFREY BOSSERT CLARK
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae

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